WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1219

IN THE MATTER OF:	Served June 16, 1972
Application of D. C. Transit System, Inc., for Authority to Increase Fares.	Application No. 752 Docket No. 241

On May 19, 1972, we issued our Order No. 1216 which rejected as unjust and unreasonable certain proposed fare increases reflected in tariffs filed by D. C. Transit System, Inc. (Transit); directed Transit to continue to charge the fares currently in effect; and established as a precondition to any future fare adjustment the infusion of $6.4 million into the capital structure of the company. We entered this order on the basis of our finding that Transit's unstable financial structure has resulted in a transit operation which is neither economical nor efficient as required by Section 6 of the Compact, and that this uneconomical and inefficient method of operation, and the resulting deterioration in service, could not be remedied merely with a fare increase.

While we observed that the company's expenses appear to exceed its gross operating revenues, we concluded that the Compact and the Constitution did not require us, as a matter of law, to adjust fares solely on such a showing without regard to the economy and efficiency of the operator's business, its financial instability, and the resulting present and future deterioration in its service to the bus-riding public. Instead, we construed the Compact to provide what we termed a "reciprocal obligation." For the bus rider, this obligation, we held, entailed the payment of a fare sufficient to enable an efficiently and economically operated transit company to provide adequate transportation services and realize a reasonable return on its investment. For the company, this obligation entails the furnishing of adequate transportation services by an efficiently and economically operated organization to the end that the passenger need pay no more than the lowest fare consistent with a reasonable return.

Having found that Transit had breached its obligation to the bus-riding public, we turned to the appropriate remedy. On the basis of the record before us, we endeavored to look into the future and determine whether, if rates were adjusted, the public could be reasonably assured that the company would correct the inefficient and uneconomic method of operation which we had identified and provide the adequate service which is the riders' due. The record clearly showed that a fare adjustment alone would not remedy the situation and that if our only order was an adjustment in fares, the result would be continued financial instability and a deterioration in the level and quality of transportation service afforded the public. Accordingly, we concluded that drastic remedial action was required to bring the company's capital structure into balance to provide the stability necessary to achieve an efficient and economical transit operation. Thus it was that we required the company to produce $6.4 million in funds from sources other than the farebox and to allocate those funds, in specified amounts, to equipment acquisition and debt retirement as a precondition to a fare increase.

Finally, we were faced with the problem of whether the funding requirement which we established should be a concurrent condition to a fare adjustment, or whether it should be a condition precedent. We were forced to conclude that if fares were adjusted before the company produced the required funds, we would have no basis for insuring that they, in fact, would be forthcoming. This, we held, would be calling upon the bus rider to pay a fare to an inefficiently and uneconomically operated transit company without any assurance that the company would remedy those defects and fulfill its obligation to the rider by providing, in the future, efficient, economical, and adequate transportation. We declined to impose such a one-sided and unjust burden on the bus-riding public.

In accordance with these findings and conclusions, we held that Transit had not demonstrated that its proposed fares were just and reasonable, and we directed the company to continue charging the existing rates. To avoid any misplaced reliance on the part of the intervenors or the public, however, we cautioned that once the company had complied with our precondition and thereby demonstrated its willingness to provide efficient, economical and adequate transportation services, a fare increase would likely be required. And, to minimize any

hardship on Transit while it was complying with our precondition, we stated our determination that the record compiled in this proceeding, once supplemented by the production and allocation of the funds called for by our precondition, would be sufficiently fresh during the 90 days following entry of our order to permit us promptly and expeditiously to adjust the fares. We had in mind proceeding expeditiously, once the company has demonstrated compliance with our precondition, on the basis of the present record, supplemented as need be, to determine the lawful fare to be charged by Transit under the altered circumstances.

Following entry of our order, Transit advised us by hand-delivered letter that it had unilaterally determined our action to be "illegal and invalid" and that it intended to place into effect in 32 hours the very fares which we had held to be unjust and unreasonable. Faced with this blatant refusal to abide by our order, at least pending an application for reconsideration and, if necessary, judicial review in accordance with the procedures established by Section 17(a) of the Compact, we directed our staff to institute an injunction proceeding in the United States District Court for the District of Columbia pursuant to Section 18(a) of the Compact. After a full hearing, the District Court entered an injunction forbidding Transit from charging fares other than those established in our order. Washington Metropolitan Area Transit Commission v. D. C. Transit System, Inc., Civil Action No. 1061-72 (D.D.C.). 1/

The District Court entered its injunction at 4:00 p.m. on June 1, 1972. At 4:35 p.m. the same day, Transit filed with us a 24-page document entitled "Notice of Invalidity of Order No. 1216 And, In the Alternative, Application for Reconsideration

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1/ In its opinion, the District Court stated: "For an allegedly aggrieved utility with all the advantages of a monopoly and a special Act of Congress to flout the law and established procedures in the manner here described is to say little of its officers and management." It is precisely this kind of conduct which led us to conclude that we could not expect compliance from Transit if we established our funding requirement as a concurrent condition.

of Order No. 1216." On June 6, 1972, Transit supplemented its application. Replies were filed by two of the parties. For reasons which follow, we have concluded that Transit's application must be denied.

Although its reconsideration application, as supplemented, presses some 56 alleged errors, we understand Transit's principal argument to be that we were without authority to enter Order No. 1216. Transit, in essence, contends that: (1) we must authorize fares sufficient to enable it to cover its operating expenses and interest requirements and (2) we lack power to precondition any fare increase upon the completion of the corrective measures which we found necessary and appropriate in this case to insure that Transit provides efficient, economical and adequate transportation services. Closely related to these arguments, which are pressed upon us in both statutory and constitutional terms, is Transit's procedural argument which rests on the premise that the Compact requires us to either permit its proposed fares to take effect or to establish a "lawful fare," which Transit contends must at least be a break-even fare, within 120 days from the date a suspension order is entered. We agree that these are the central issues presented in this proceeding, and we have accordingly considered Transit's arguments with commensurate care. We have concluded that our action in this case is fully in accord with statutory and constitutional requirements governing public utility ratemaking.

We start from the premise, not seriously challenged by Transit, that Sections 6(a)(3) and 6(a)(4) of the Compact are to be read together,[2/] and that we are required, in passing

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2/ In our Order 1057, issued July 1, 1970, we examined at some length the relationship of Sections 6(a)(3) and 6(a)(4) of the Compact. We stated that these sections "must be read [together] to form a harmonious whole," and, while we found that the record then before us did not warrant withholding of a fare increase otherwise compelled by the facts and circumstances in that case, we were quite careful to limit our discussion to the record then before us. See Order 1057, pp. 2-6. Our opinion which accompanies Order 984, issued on October 24, 1969, reflects the same construction of the statute, and the same conclusion that the facts of record in that case did not warrant the action which we have been compelled to take in this proceeding. See Order 984, pp. 25-28.

upon a rate application, to consider and weigh not only the interests of the company, including its right to a reasonable return on its investment, but also the interests of the public, including the public's right to economical, efficient and adequate transportation services. D. C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission, 121 U.S. App. D.C. 375, 388, 350 F.2d 753, 766 (1965); cf. Moss v. Civil Aeronautics Board, 139 U.S. App. D.C. 150, 430 F.2d 891 (1971). These interests, as we pointed out in Order 1216, impose what we termed "reciprocal obligations" on the part of the carrier and its passengers. Upon a showing that it is now providing, and may in the future reasonably be expected to continue to provide, the economical, efficient and adequate transportation service to which the public is entitled, the carrier, in turn, is normally entitled to a fare which will produce a reasonable return. But where, as in this case, the record demonstrates that the carrier is in default with respect to its obligations under Section 6(a)(3) of the Compact, it is not entitled to a fare increase as a matter of law.

Transit's contrary argument overlooks the weight of authority from regulatory agencies operating under statutes similar to ours[3/]. Judicial decisions from other jurisdictions are in accord[4/]. Indeed, reported decisions reflecting the law in each of the three jurisdictions governed by the Compact

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3/ E.g., Rockville Water and Acqueduct Co., 78 P.U.R.3d 45 (Conn. 1968); reh. den., 78 P.U.R.3d 53 (Conn. 1969); North Missouri Telephone Co., 49 P.U.R.3d 313, 317-319 (Mo. 1964); Blair Telephone Co., 51 P.U.R.3d 262, 264 (Neb. 1963); Southern Bell Telephone & Telegraph Co., 26 P.U.R.3d 55 (La. 1958); Long Beach Motor Bus Co., 12 P.U.R.3d 198 (Cal. 1955); Salt Lake City Lines, 4 P.U.R. 3d 144 (Utah 1954); Indiana Associated Telegraph Co., 88 P.U.R. (NS) 196, 201 (Ind. 1950); Commonwealth Telephone Co., 19 P.U.R. (NS) 331 (Wisc. 1937); United Corp. 1931B P.U.R. 497, 502-504 (Ind.); Ocean County Gas Co., 1919B P.U.R. 874, 880-881 (N.J.).

4/ E.g., North Carolina v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970); United Telephone Co. v. Florida, 215 So.2d 609 (Fla. 1968), appeal dismissed, 394 U.S. 995 (1969); Lakewood v. Lakewood Water Co., 54 N.J. Super. 371, 148 A.2d 885 (1959). Accord: Apple River v. Illinois Commerce Comm., 18 Ill.2d 506, 165 N.E.2d 329 (1960).

demonstrate that our order is not without precedent. As early as 1915, the Public Utilities Commission of the District of Columbia exercised its discretion and refused to grant a fare increase, otherwise justified, when the record showed the transit operator to be rendering inadequate service notwithstanding that the operator was losing money, and would continue to lose money, without the requested increase. In re Metropolitan Coach Co., 1915D P.U.R. 740. The next year, the West Virginia Commission entered a similar order with respect to a water company. Thorn v. Montgomery Light & Water Improvement Co., 1916C P.U.R. 406, 408 (W.Va.). See also, United R. & E. Co., 1919C P.U.R. 74, 98-100 (Md.).

Of course, each case must turn on its particular facts, and there are obviously instances in which a fare increase would be justified notwithstanding a finding that a company was not providing economical, efficient and adequate transportation service. In this regard, we agree with the New Jersey court:

> "[T]he board has a large measure of legislative discretion in the exercise of its rate-making power, controlled by the statutory standard. It is free to make 'pragmatic adjustments which may be called for by particular circumstances.' Thus, it may under the facts adduced before it in a particular rate case conclude that the issue of adequacy of service is collateral and would so complicate the rate case that it should be taken care of upon complaint in a separate proceeding. On the other hand, the board would be privileged, in a case where the utility had failed over a long period to provide safe, proper, and adequate service and had flagrantly disregarded orders of the board to improve that service, to refuse any rate increase as the most practical method of getting the utility to remedy that deficiency. Again, the board might conclude that the inadequate service rendered was due to the company's need for additional revenues for capital expenditures, and determine that the withholding of rate relief might cause further deterioration in service.
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> In yet another case of demonstrated inadequate service, where the utility promised to make necessary improve-

ments, the board might deny the application, granting leave to renew it after it had had an opportunity to see if the improvements were carried out and the service made adequate and proper, or, where the utility admitted that the service could be improved but claimed financial inability to do so, the board might allow only such rates as would represent the present value of the service, until such time as the service was made reasonably adequate. Finally, it might grant emergency rate increases on the condition that if the utility failed to render reasonable service the rates would be cancelled." Lakewood v. Lakewood Water Co., supra n. 5, 54 N.J. Super. at 381, 382, 148 A.2d at 890-891. (citations omitted).

We construe the Compact as vesting us with the necessary tools to enable us to discharge our responsibility to the public and insure that it obtains from carriers subject to our jurisdiction economic, efficient and adequate service. Surely, Congress and the Compact signatories did not impose upon us a duty to consider and protect the public interest, on the one hand, and then fetter us with a statutory scheme so rigid and unyielding as to make impossible the responsible discharge of that duty, on the other hand. Cf. Payne v. Washington Metropolitan Area Transit Commission, 134 U.S. App. D.C. 321, 326-327, 415 F.2d 901, 906-907 (1968); Moss v. Civil Aeronautics Board, 139 U.S. U.S. App. D.C. 150, 160-161, 430 F.2d 891, 901-902 (1970).5/ Mindful of the fact that our responsibility to protect the public interest is at least equal to our obligation to consider Transit's interests,6/ we hold that while we may grant a

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5/ Article XI, Section 2 of the Compact directs us to liberally construe the act "to eliminate the evils described therein and to effectuate the purposes thereof" and Article XII, Section 15 authorizes us to enter such orders as we may "find necessary or appropriate to carry out the provisions of this Act." See cases cited at nn. 6-8, infra.

6/ Moss v. Civil Aeronautics Board, supra, 139 U.S. App. D.C. at 161, 430 F.2d at 902.

fare increase, and condition that increase on a carrier's satisfaction of the steps we have found necessary to insure future performance of its statutory obligation to provide economical, efficient and adequate transportation,[7] we are not compelled to do so if we conclude, as we have in this case, that such an order will not provide sufficient assurance that the public will be protected.[8] We thus reject Transit's contention that the Compact precludes the entry of an order such as we have entered in this case.

7/ We have entered such orders before. See e.g., Order No. 1127, p. 23 (March 24, 1971); Order No. 1101, pp. 24-25 (November 13, 1970), Order No. 1052, pp. 31-33 (June 26, 1970); Order No. 1037, p. 21 (April 23, 1970). Other agencies have likewise found concurrent condition orders effective in certain cases to harmonize the rights of the carrier and the public. E.g., In re Long Beach Motor Bus Co., 12 P.U.R.3d 198 (Cal. 1955); Salt Lake City Lines, 4 P.U.R.3d 144 (Utah 1954); Poughkeepsie & W. Falls R. Co., 1920C P.U.R. 995 (N.Y.); Ocean County Gas Co., 1919B P.U.R. 874 (N.J.).

8/ Although we have not been forced to enter such an order before, we have already noted that the Public Utilities Commission has. Metropolitan Coach Co., 1915D P.U.R. 740 (D.C.). Other agencies, in rate proceedings such as this, have resorted to a variety of orders to insure that a regulated utility fulfills its obligations to the public. Some agencies proceed to fix new rates, and to suspend the effectiveness of those rates pending proof of satisfactory compliance by the utility that the defects have been remedies. E.g., Blair Telephone Co., 51 P.U.R.3d 262, 264 (Neb. 1963); Indiana Associated Telegraph Co., 88 P.U.R. (NS) 196, 201 (Ind. 1950); Commonwealth Telephone Co., 19 P.U.R. (NS) 331, 335-336 (Wisc. 1937). Other agencies follow the course which we have adopted here and refuse to pass upon the utility's rate request until the deficiencies have been remedied. Rockville Water and Aqueduct Co., 78 P.U.R.3d 45 (Conn. 1968), reh. denied, 78 P.U.R.3d 53 (Conn. 1969); North Missouri Telephone Co., 49 P.U.R.3d 313, 317-319 (Mo. 1964); United Corp., 1931B P.U.R. 497, 502-504 (Ind.).

Transit also contends, however, that we have abused our discretion in failing to order it to perform the corrective measures which we have found to be necessary concurrently with the enjoyment of a fare increase. Before we entered our order, we carefully considered whether a fare order with concurrent conditions to protect the public interest would provide us with sufficient assurance that Transit would, in the future, fulfill its obligation to provide efficient, economical and adequate transportation. Several factors persuaded us that it would not.

First, we have found that Transit's financial instability is due largely to management decisions which are the critical factors in creating the present unsatisfactory financial structure. The Loconto report and testimony identified corporate decisions, not inadequate fare revenues, as the major factor in Transit's present financial instability. We concluded that additional funds, not increased fares alone, were required to remedy this situation. Here again, the expert testimony showed that the company's major need was additional funding from sources other than the farebox, and, as we made clear in Order 1216, we agree.

Second, we considered the fact that Transit has shown no willingness to correct its financial structure despite our exhortations over the years.[9/] The continued deterioration

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9/ In the first case which this Commission processed with regard to Transit's fares, we noted our concern "about the need for [Transit] to increase its equity in the business in order to insure the financial stability" of the carrier. Order 245, p. 43 (April 12, 1963). In 1966, we reiterated this concern and again called upon Transit's management to remedy the situation. Order 563, p. 11 (January 26, 1966); Order 564, pp. 31-33 (January 26, 1966). At that time, however, we were able to conclude from the record then before us that Transit's financial structure had not interfered with its responsibilities "for rendering good service to the public." Order 564, supra, at 31. Even with that finding, however, we stated that "Transit's debt-equity ratio should not be allowed to deteriorate further." Id., at 33. Two years later, we had occasion to disapprove of two management decisions which resulted in a siphoning of cash into two subsidiary corporations, and we noted that "in the management of its cash working capital, the company's guiding principle must be the maximum

of the company's cash position has already caused a substantial deterioration in the service which it offers the public,[10] and

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9/ (Cont'd) protection of its ability to meet its obligations under its franchise, the Compact, and Commission orders." Order 773, p. 29 (January 26, 1968). In that same order, we concluded that management's decisions had not seriously affected the adequacy of the company's service, and we found reason to believe that the company had recognized its obligations to the public and would take action to meet those responsibilities in the future. Order 773, supra, at 29. Even so, we urged Transit "to raise the cash needed for transit operations through their non-operating properties, if no other sources are available." Ibid. The next year, a similar exhortation was contained in our Order 984, at p. 20 (October 24, 1969). Transit has thus been on notice of our concern for more than nine years during which, instead of taking steps to remedy the situation, it has deliberately allowed it to deteriorate.

10/ We found, inter alia, that the company's financial instability has resulted in too few drivers, mechanics and bus cleaners, and a consequent inadequacy of its service. Reports which Transit has filed with us, and which we officially note, show a marked deterioration in the company's service. During May 1971, the company's driver force was only 16.8 below quota on a weekly average, and during the same time, the company had a weekly average of 6.2 drivers-in-training. During May of this year, by contrast, the company was 42.7 drivers under quota on a weekly average, and had only a weekly average of 2.5 drivers-in-training. That this has impacted seriously on the adequacy of the company's service is clearly shown by the number of trip-blocks not operated:

1971		1972	
Week Of	Trip Blocks Not Operated	Week Of	Trip Blocks Not Operated
May 2	57	May 7	106
May 9	27	May 14	73
May 16	28	May 21	132
May 23	45	May 28	191
May 30	54		

A "trip block" represents the trips scheduled to be operated by a single bus on a single day.

we concluded, on the basis of the record and our expertise in transit operations, that unless this situation was remedied, service would continue to deteriorate to unacceptable levels This history forced us to conclude that Transit cannot be relied upon voluntarily to remedy its own financial ills.

Third, Transit's failures to comply with our prior orders, including importantly Order 1052 requiring bus-purchases, was another factor that persuaded us not to impose concurrent corrective conditions. We thus found no basis to believe that Transit would comply with concurrent conditions. As its failure to comply with our outstanding bus-purchase order has directly affected the adequacy of the company's service,[11] we determined that our precondition order was the only method by which we could insure the public that the company would deliver its part of the reciprocal obligations imposed upon it by the Compact.

Finally, the fact that we lack power to insure compliance with a concurrent condition order by requiring Transit to post a sufficient bond to indemnify the public in the event the company fails to comply with our order, or to order the company to make reparations in the event of non-compliance,[12] is another factor which we take into account.

11/ The average age of a Transit bus has risen from 6.96 years as of December 31, 1966 to 9.79 years as of September 30, 1971. We know that older buses are less comfortable for the passenger. More importantly, old buses have a higher incidence of mechanical and equipment failure than newer equipment, thereby providing the public with a less reliable, and consequently less adequate, transportation service. Coupled with the company's failure to employ sufficient drivers, mechanics and cleaners, and the marked increase in trips not operated, this is another factor which directly and materially impacts upon the adequacy of its service. See supra, n. 10.

12/ That we lack such power is clear from Williams v. Washington Metropolitan Area Transit Commission, 134 U.S. App. D.C. 342, 361 n.94, 415 F.2d 922, 941 n.94 (1968).

For these reasons, and for the reasons set forth in our principal order, we reject Transit's contention that we lack power under the Compact to enter the order under consideration or that we abused our discretion in providing that Transit's compliance with the corrective measures which we directed shall be a precondition to any fare increase. Transit, however, has another string to its bow, for it argues that even if the Compact authorizes us to enter the challenged order, the Constitution forbids it. We thus turn to Transit's constitutional contention.

Citing Bluefield Water Works and Improvements Co. v. West Virginia Public Service Commission, 262 U.S. 679 (1923), Transit argues that the effect of our order is the confiscation of its property in violation of the Fifth and Fourteenth Amendments to the Constitution.[13/] Our prior orders have shown a sensitive awareness of this principle,[14/] and we quite agree that, as a general proposition, an order which requires a public utility to furnish service at a loss constitutes constitutionally prohibited confiscation of its property. But just as performance of its obligation to furnish an economic, efficient and adequate transportation service is a condition to Transit's statutory right to a reasonable rate of return, so too is performance of that obligation a condition precedent to constitutional protection against confiscation. As Professor Barnes has put it:

> "The Supreme Court in its Bluefield 'rule' made 'efficient and economical management' a prerequisite to the utility's claim to either a nonconfiscatory or a reasonable rate of return.
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> The utility is normally entitled to revenues adequate to cover its operating expenses, including taxes and depreciation, plus a reasonable return

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13/ Since the confiscation standards are the same whether tested by the Fifth or the Fourteenth Amendment, we have assumed that both amendments are applicable to this Commission established by two states, subject to the Fourteenth Amendment, and the District of Columbia, subject to the Fifth Amendment.

14/ E.g., Order 1052, pp. 2-6 (June 26, 1970); Order 984, pp. 25-28 (October 24, 1969).

> on the investment with which it serves the public. But this right of the utility is dependent upon the full discharge of its obligations to the consuming public, among which is the fundamental duty to observe due diligence in management, to maintain a high standard of efficiency, and to conduct its affairs with maximum economy." Barnes, The Economics of Public Utility Regulation 532, 601 (1942).

A principle similar to that which obligates us to disallow unreasonable expenditures which are found to be inconsistent with economic and efficient management, also requires us to insure that before the company insists that the public perform its obligation of paying fares sufficient to provide a reasonable return, the company demonstrate its willingness to provide the public with the economic, efficient and adequate transportation which the Compact requires. Although infrequently framed in confiscation terms, all of the authorities which we have cited in support of our construction of the Compact, supra pp. 4 - 8, would be subject to constitutional attack if Transit is correct. We decline to assume that regulatory agencies, both in this jurisdiction and elsewhere, have engaged in unconstitutional proceedings for over a half century. We are fortified in this conclusion by those decisions which have squarely rejected confiscation claims when presented.[15/]

If, indeed, the company temporarily sustains a loss while it complies with our precondition order, it will not be because we have ordered it to do so, but because the effects of the company's past decisions have now impacted so seriously upon its statutory obligation to provide the public with efficient, economical and adequate transportation service as to require us to direct remedial measures as a precondition to any fare adjustment. The Constitution does not guarantee a public utility immunity from loss occasioned by uneconomic and inefficient management decisions, and we do not believe that it bars a regulatory agency on a record such as this from taking adequate steps to protect the public interest even if the short term effect of such an

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15/ E.g., United Telephone Co. v. Florida, 215 So.2d 609 (Fla. 1968), appeal dismissed, 394 U.S. 995 (1969); Rockville Water and Acqueduct Co., 78 P.U.R.3d 45 (Conn. 1968), reh. denied, 78 P.U.R. 3d 53 (Conn. 1969).

order is a temporary loss to the company. We made clear in our main order, and we take this occasion to reiterate, that as soon as Transit indicates its willingness to fulfill its statutory obligations to the public, we stand ready to insure that the public fulfills its reciprocal obligations to Transit.16/

Finally, we briefly turn to Transit's procedural argument which necessarily assumes authority under both the Compact and the Constitution for the order which we entered, but which relies on the time limitations set forth in Section 6(a)(2). From these limitations, Transit argues that its proposed fares became effective as a matter of law since we did not make full findings and establish the "lawful fare" within the period prescribed by Section 6(a)(2). We do not agree. Within the statutory period,

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16/ Transit has mistakenly asserted that we directed compliance with our precondition within 90 days without any evidence establishing that it was possible for the company to comply during that period of time. Wholly aside from the fact that the company has yet to claim inability to comply within a 90-day period, we ordered no such thing. What we did say was that the record compiled in this case would remain sufficiently fresh for 90 days so as to permit us to supplement that record, as necessary, and proceed to prompt disposition of any fare case instituted following Transit's compliance with our preconditions. In the event Transit elects not to comply with our precondition during the 90-day period following issuance of our main order, it is nevertheless free to apply for a rate adjustment whenever it does so comply, and to then ask us to use whatever portion of the present record may remain sufficiently fresh as to permit proper disposition of its application. However, after the expiration of the 90-day period established by our order, Transit will bear the burden of demonstrating that the record in this case remains sufficiently fresh as to warrant its use in any subsequent proceeding.

we completed full hearings and entered full and complete findings as to why Transit was not providing the efficient, economic and adequate transportation service which it is required to furnish, and we stated our legal conclusion that until Transit remedied this deficiency, it was not entitled to a fare adjustment. We have already set forth in detail the reasons why we believe the Compact compelled this result.[17/] We therefore conclude that where, as here, we have found a carrier deficient in its Section 6(a)(3) obligations to the public, Section 6(a)(2) requires us to proceed, within the statutory period, to enter an appropriate order. In this case, the appropriate order rejected Transit's proposed fare increases and established the conditions which the carrier must satisfy as a precondition to a rate increase. Until those conditions are satisfied and a further rate order entered, the previously established "lawful fare" continues, as we explicitly held in Order 1216-B, as the "lawful fare" which we are required to establish by Section 6(a)(2).

Transit's remaining arguments do not require extended discussion. It contends that we erred in crediting the testimony of Mr. Loconto. This argument comes too late, for Transit did not object to the competency of the witness at the hearing, nor did it move to strike the testimony. Indeed, Staff Exhibit 17 (the Loconto Report) was received into evidence without objection. Moreover, Transit's reasons in support of its argument are wholly inadequate. We were quite aware of each of the factors which Transit enumerates in its petition for reconsideration, but we concluded that they had little bearing on the evaluation of Mr. Loconto's testimony. The witness testified as an expert in financial analysis, which he uncontestably is, and we considered his testimony highly probative to the issue of economic and efficient management of Transit.

Transit complains, "on information and belief", that the staff improperly participated in our deliberations. The role

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17/ Of course, as we have already indicated, other cases may call for different dispositions, see supra, pp. 6-7, and we view the Compact as sufficiently flexible to accommodate the need to implement its specific demands with "necessary and appropriate" orders tailored to the facts of a particular proceeding.

of our staff is well known to the parties who regularly appear before us, and we note that Transit's counsel has continually appeared on behalf of his client in many proceedings held before us over the years. Like other regulatory agencies,[18] it is the practice of this Commission frequently to consult with its staff, although decision in this proceeding, as in all other proceedings before this Commission, was the result of the determination of the commissioners, based upon their individual evaluation of the record and the arguments of the respective participants in the proceeding. In the past, when our decisions have favored his client, Transit's counsel has not seen fit to object although his present contention, if correct, would vitiate proceedings which terminate favorably to his client as well as those which do not. In these circumstances, we hold that the objection, if it was to be asserted, was required to be made before, not after, the order was entered. By withholding the objection until the petition for reconsideration, it has been waived. International Paper Co. v. Federal Power Commission, 438 F.2d 1349, 1357-1358 (2d Cir. 1971).[19]

In the event its application for reconsideration is denied, Transit has asked us to stay our order pending judicial review. In view of our finding that the public is being deprived of efficient, economic and adequate transportation, we could not responsibly stay this order. In any event, we have previously held that we lack power to stay our own orders.[20] Transit's application for a stay will accordingly be dismissed.

18/ E.g., American Telephone and Telegraph Co., 2 F.C.C.2d 142, 146 (1965).

19/ We observe, however, that the practice followed by this, and other regulatory bodies, of consulting with the staff has been sustained in the face of challenges similar to those advanced by Transit. E.g., American Telephone and Telegraph Co. v. Federal Communications Commission, 449 F2d 439, 453-455 (2d Cir. 1971); Wilson & Co. v. United States, 335 F.2d 788, 796-797 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965).

20/ Order 991 (November 17, 1969).

We have considered and rejected Transit's other arguments.[21] While we have declined to stay our order pending judicial review, we are anxious to discharge our respective responsibilities to the public and to Transit. To this end, we agree that prompt disposition of Transit's contemplated review proceeding is in the public interest, and we will instruct our counsel to cooperate in the establishment of a schedule for expedited briefing and argument of Transit's petition for review to the end that this case may be presented to the Court for disposition at the earliest date consistent with the adequate presentation of briefs and the Court's calendar requirements. In the interim, however, we once again express the hope that Transit will take seriously our precondition requirements and make plans to implement those requirements.

21/ Transit also argues that this Commission has erred in not yet adopting proposed rules for submission to the Price Commission. Transit misunderstands the purpose and effect of such rules. The submission to and approval by the Price Commission of such rules merely permits the regulatory agency to assume full and final responsibility for any rate increase it grants without being subject to further review by the Price Commission. In the absence of such rules, this Commission still is required to ascertain the compliance of any rate increase it grants with the guidelines established by the Price Commission. Until we make such a finding, no carrier subject to our jurisdiction can put into effect increased rates. There was, of course, no need for such a finding in this case since we concluded no increase was proper.

THEREFORE, IT IS ORDERED:

1. That the application for reconsideration of Order No. 1216, filed on June 1, 1972, by D. C. Transit System, Inc., as supplemented on June 6, 1972, be, and it is hereby, denied.

2. That the application of D. C. Transit System, Inc., for a stay of Order No. 1216 be, and it is hereby, dismissed.

BY DIRECTION OF THE COMMISSION:

PRESTON C. SHANNON
Commissioner

SULLIVAN, Vice Chairman, dissents.